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9 UNITED STATES DISTRICT COURT

10 FOR

11 THE NORTHERN DISTRICT OF CALIFORNIA

12 WILLIAM SETZLER

13 Plaintiff,

14 vs.

15 CITY AND COUNTY OF SAN FRANCISCO, a  
16 municipal corporation, and DOES ONE through  
17 TEN, inclusive

18 Defendant.

CASE NO: 07-CV-05792-SI

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
AND MOTION TO STRIKE**

**Date: April 7, 2008**

**Time: 9:00 a.m.**

**The Honorable Susan Illston**

19 Defendant City and County of San Francisco ("Defendant City") argues in its Motion to  
20 Dimiss/Strike that the decision issued by Judge James L. Warren denying a Writ of Mandate  
21 sought by Plaintiff William Setzler precludes Setzler's entire complaint. Defendant's position is  
22 wrong. Judge Warren's decision of March 1, 2006 did not address the issues raised in Setzler's  
23 complaint and certainly did not provide the Defendant City with a "free pass" to continue to  
24 violate Setzler's constitutional and statutory rights after the decision was issued. Yet, that is  
25 what the City, and its Sheriff's Office, did. Having continued to violate Setzler's rights, the City  
26 now seeks to insulate itself with the blanket of Judge Warren's decision, not conceding that  
27 illegal and unconstitutional acts are alleged to have occurred after the issuance of the decision.

1 This Court, recognizing that unlitigated issues remain in contention, should push the City  
 2 back out into the cold where it must defend its egregious and reprehensible treatment of a man  
 3 stripped of any means to obtain the benefits he was owed or employment to earn a paycheck.

#### 4 **I. FACTUAL BACKGROUND**

5 It is axiomatic that a Motion to Dismiss must be based entirely on facts contained within  
 6 the four corners of the complaint or judicially noticeable and that all questions regarding those  
 7 facts must be construed in favor of the plaintiff.

8 This Court must “accept all factual allegations of the complaint as true and draw all  
 9 reasonable inferences in favor of the nonmoving party.” Id. .... “Conclusory allegations  
 10 of law and unwarranted inferences are insufficient to defeat a motion to dismiss for  
 11 failure to state a claim.” Id. .... “A dismissal for failure to state a claim is proper only if it  
 appears beyond doubt that the plaintiff can prove no set of facts in support of his claim  
 which would entitle him to relief.” (citation omitted by counsel)  
 12 *Arpin v. Santa Clara Valley Transp. Agency* (9<sup>th</sup> Cir. 2001) 261 F.3d 912, 923. Nevertheless, in  
 13 its Motion to Dismiss, Defendant interprets factual allegations to its benefit and omits discussion  
 14 of factual allegations which preclude dismissal. For these reasons alone, Defendant’s Motion to  
 15 Dismiss/Strike should be denied. Nevertheless, Plaintiff will file a First Amended Complaint,  
 16 pursuant to Federal Rule of Procedure Section 41(a), to clarify his allegations. To the extent that  
 17 the Court finds any merit to Defendant’s arguments, and finds that those arguments are properly  
 18 based on allegations within the amended complaint, Plaintiff should be allowed to further amend  
 19 his complaint.

20 Plaintiff William Setzler suffered an occupational injury to his foot on January 2, 1990.  
 21 This injury left him with a continuing disability which was diagnosed by the City of San  
 22 Francisco’s doctor, Richard Coughlin, as Morton’s neuroma. Dr. Coughlin declared Setzler  
 23 permanent and stationary and unable to return to his normal duties on January 6, 1992. Setzler  
 24 applied for a PERS industrial disability retirement (“IDR”) and was denied. On subsequent  
 25 occasions, while continuing to seek his disability retirement, Setzler also sought accommodation  
 26 from the Sheriff’s Office and a return to work on a modified, light duty basis and was refused.  
 27 Faced with this deliberate Catch-22 created by the City, Setzler continued his long legal battle to  
 28 obtain his disability retirement benefits.

1       Setzler's legal battle was stymied by substantial interference with his procedural rights  
2 including, most significantly, admitted concealment of critical medical records and  
3 misrepresentation of the facts of Setzler's medical condition by Deputy City Attorneys, most  
4 notably David Benjamin. Mr. Benjamin, who was admonished by the California Bar Association  
5 for his actions, appears to have been rewarded with an assignment as an Administrative Law  
6 Judge.

7       Setzler's many attempts to obtain other employment were also stymied by  
8 misrepresentations by Deputy City Attorneys and the Sheriff's Office. Setzler's goal of  
9 obtaining alternative employment within the City were blocked by the Sheriff's Office's  
10 improperly and secretly designating his leave as "sick leave" rather than disability leave, thereby  
11 preventing Setzler from obtaining a transfer. Setzler's ability to obtain outside employment was  
12 defeated by the disability retirement rules precluding him from seeking outside employment  
13 while his case dragged on. Setzler's attempts to return to the Sheriff's office were also rebuffed  
14 with the false claim that the Sheriff's Office does not provide light duty work to accommodate  
15 disabilities.

16       Ultimately, after Setzler sought a Writ of Mandate compelling the City to approve his  
17 request for disability retirement and the City received a decision Denying Motion To Grant Writ  
18 petition from Judge James Warren on March 1, 2006, the Sheriff's Office terminated Setzler,  
19 eight months later, on November 1, 2006, on the alleged basis that he had failed to complete  
20 probation. The termination letter also cryptically referred to the decision by Judge Warren.  
21 However, between March 1, 2006, the date of the decision, and November 1, 2006, the date of  
22 Setzler's termination, Setzler continued to both seek IDR benefits, in which he claims a property  
23 interest, and to seek accommodated placement in the Sheriff's Office. Specifically, the  
24 following occurred **after** the allegedly preclusive decision by Judge Warren but while Setzler  
25 remained an employee of Defendant:

- 26       1)       Setzler appeared on a cable television program entitled "Californians Injured  
27               At Work" and discussed his ongoing battle with the Retirement Board and the  
28               concealment of medical evidence by former deputy City Attorney David

1 Benjamin and the City Attorney's office. The retaliatory acts after this  
2 appearance were not (and, temporally, could not have been) adjudicated by  
3 Judge Warren.

4 2) Setzler reported for duty to the Sheriff's Office on June 16, 2006, after the date  
5 of Judge Warren's decision. In his initial letter to Sheriff Hennesey, Setzler  
6 informed the Sheriff of his appearance on "Californians Injured At Work."  
7 Despite several attempts by Setzler and his attorney to engage the Sheriff's  
8 Office regarding a return to work, the Sheriff's Office refused to respond,  
9 refused to meet with Setzler, failed to reassign him to a position, and failed to  
10 accommodate him. The Sheriff's Office's only response was to terminate  
11 Setzler on November 1, 2006. These failures to employ, failure to  
12 accommodate and the termination were not (and, temporally, could not have  
13 been) adjudicated by Judge Warren.

14 3) The Sheriff's Office continued to carry Setzler on sick leave thereby precluding  
15 him from obtaining any other employment outside the Sheriff's Office. This  
16 retaliatory action, which deprived Setzler of employment of any kind, was  
17 never adjudicated by Judge Warren.

18 4) The Sheriff's Office terminated Setzler on November 1, 2006 for the reason  
19 that he "failed to complete probation." Setzler had failed to "complete  
20 probation" roughly 15 years earlier thereby raising the strong inference that this  
21 stated reason was pretext for termination for another reason: retaliation for  
22 Setzler's outspoken criticism of the City's IDR process and practices,  
23 retaliation for Setzler's complaints about the Sheriff's Office's refusal to  
24 accommodate him, or simply to get rid of Setzler rather than accommodate his  
25 disability. These issues pertaining to the real reason for Setzler's termination  
26 were never adjudicated by Judge Warren.  
27  
28

1 **II. ARGUMENT**

2 **A. Plaintiff's Claims Are Not Precluded By Collateral Estoppel or Res Judicata**

3 How does Defendant now argue that all of the issues described above are covered under  
 4 the blanket of Judge Warren's ruling? It can't and it shouldn't. For example, the City argues in  
 5 its Brief that "[t]he doctrine of claim preclusion bars all grounds for recovery which could have  
 6 been asserted, whether they were or not, in a prior suit between the same parties and the same  
 7 causes of action." Defendant's Motion to Dismiss, page 7. How was Setzler supposed to litigate  
 8 a termination that had not yet occurred? How was Setzler supposed to challenge a refusal to  
 9 accommodate his disability that had not yet occurred? How was Setzler supposed to litigate  
 10 issues of violation of his rights to free speech that had not yet occurred? How was Setzler  
 11 supposed to litigate continuing violations of his due process and Civil Service rights that had not  
 12 yet occurred? He could not, did not, and should not be precluded from doing so now.

13 In *Title Guarantee & Trust Co. v. Monson* (1938) 11 Cal.2d 621, the California Supreme  
 14 Court held that preclusion did not apply to issues that a) "were not germane to nor essentially  
 15 connected with the actual issues that were raised in the former action, even though, with  
 16 propriety such issues might have been raised therein" or b) that, "although growing out of the  
 17 same subject matter, but which constitute separate or distinct causes of action, and which were  
 18 not put in issue in the former action." *Id.* at 631. See also, *Owens v. Kaiser Foundation health*  
 19 *Plan, Inc.* (9<sup>th</sup> Cir. 2001) 244 F.3d 708, 713, cited by Defendant, in which the central criterion  
 20 for determining whether there is an identity of claims between the first and second actions is  
 21 whether the two actions arise out of the same transactional nucleus of facts. The post-Warren  
 22 claims cannot have arisen out of the same transactional nucleus of facts since the transactions  
 23 had not occurred yet.

24 In addition, Judge Warren's decision did not absolve Defendant City of every prior  
 25 wrong that it had committed against Setzler, if that wrong was not discussed in the opinion and  
 26 could not have been litigated in the action seeking a Writ of Mandate. Judge Warren's decision  
 27 did not address any of the following issues:

- 28 1) Setzler's wrongful termination or the reasons therefore (since it had not yet occurred).

- 2) Any issue of retaliation for exercise of freedom of speech (since it had not yet occurred).
- 3) Any issue of denial of procedural due process protected under the Constitution (since Judge Warren specifically addressed Setzler's petition to be returned to work pursuant to state statute).
- 4) Any issue of retaliation for seeking accommodation of a disability or speaking out about failure to provide such accommodation after Judge Warren signed the decision.
- 5) Any issue pertinent to the claim that the City prevented Setzler from working elsewhere by placing him on sick leave (since this was not discussed in any portion of Judge Warren's decision).

As the *Monson* Court held, the claim preclusion does not apply to separate and distinct causes of action, which were not put at issue in the prior litigation. *Id.*

In fact the evidence cited by Defendant at page 10 of its Brief in support of its argument that all relevant issues have been decided does not, in fact, provide that support. There is no statement in Judge Warren's decision to the effect that the City *did not* conceal evidence supportive of Setzler's claim for IDR but, rather, that Setzler had not shown evidence of such concealment for purposes of his arguments pertaining to the Writ of Mandate. In that context, Judge Warren made no finding that the City had not in fact violated Setzler's constitutional right of due process.

Further, there are no statements in Judge Warren's decision which preclude Setzler from pursuing a new effort to become gainfully employed with the Sheriff's Office or some other City entity. While Judge Warren (through the City's pen) had harsh words for Setzler's prior approach to interaction with the City, he also listed the options available to Setzler:

First, Setzler could have returned to full duty as a deputy sheriff if he was medically capable of performing the job's essential functions. Second, Setzler could have returned to full duty as a deputy sheriff with reasonable accommodations that would have allowed him to perform the job's essential functions. Third, Setzler could have transferred to another City job under the City's disability transfer program.

Exhibit A to Defendant's Request for Judicial Notice, page 19, lines 17-21

1 Having been chastised by Judge Warren, Setzler followed those directives starting in June of  
 2 2006 and was rebuffed by the Sheriff's Office. The issue of whether the Sheriff's Office  
 3 violated its obligations to accommodate or transfer Setzler after he made these attempts has not  
 4 been adjudicated.

5 **B. Each Cause of Action Remaining After Plaintiff's Amendment Involves**  
 6 **Specific Acts And Claims Not Barred By Res Judicata or Collateral Estoppel**

7 Each cause of action brought by Setzler contains the requisite allegations to defeat a  
 8 defense of res judicata and collateral estoppel and contains specific allegations sufficient for  
 9 Defendant to conduct discovery.

10 **1. Section 1983 Claim re Freedom of Speech**

11 In this claim, Setzler alleges that he was retaliated against and terminated for speaking  
 12 publicly about his mistreatment by Defendant City and its Retirement Board and Sheriff's  
 13 Office. While such mistreatment resulting from a retaliatory animus occurred before Judge  
 14 Warren's decision, the issue of retaliation was not adjudicated by Judge Warren and the primary  
 15 examples of the mistreatment, the Sheriff's Office's refusal to accommodate Setzler and its  
 16 termination of his employment occurred subsequent to any judicial decision.

17 **2. Section 1983 Claim re Procedural Due Process**

18 In this claim, Setzler alleges that the City and its Retirement Board and Sheriff's Office  
 19 violated his right to procedural due process with respect to his application for IDR and his  
 20 attempts to obtain other employment while the City was denying him income. While aspects of  
 21 this claim were discussed by Judge Warren in his decision, the specific question of whether the  
 22 City denied Setzler constitutionally reasonable due process was not adjudicated by Judge  
 23 Warren. While Defendant disputes that Setzler had a property interest in his employment as a  
 24 probationary employee, it says nothing anywhere in its Brief about his asserted property right in  
 25 his disability retirement benefits withheld from him through concealment or the alternative  
 26 employment that he could have obtained had not been inappropriately placed on sick leave as  
 27 opposed to disability leave.



Under the notice pleading standards, Setzler has stated a sufficient claim that he was denied procedural due process rights with regard to the actions taken against him.

On a motion to dismiss we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them. *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990); *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir.1990).

*Peloza v. Capistrano Unified School Dist.* (9th Cir. 1994) 37 F3d 517, 521

In fact, the original and Amended Complaint state specifically:

Plaintiff is informed and believes and thereupon alleges that defendants, and each of them, violated his constitutional rights as described in this Complaint because of customs, policies, directives, practices, acts and omissions of authorized policy makers of Defendant County and its Retirement Board and Sheriff's Office. These customs, policies, directives, practices, acts and omissions include, but are not limited to, the maintenance of employment practices that allow for actions which violate procedural due process rights of employees, including the maintenance of practices which allow Deputy City Attorneys to defeat meritorious claims for disability claims through fraud and concealment, and which allow employees of the Sheriff's Office to prevent an employee from returning to work on an accommodated basis if denied disability retirement and deny disabled employees alternative employment through violation of the Civil Service rules. These customs, policies, directives, practices, acts and omissions constitute gross negligence and/or deliberate indifference on the part of Defendant County in its obligation to ensure the preservation of an employee's constitutional rights.

Plaintiff has alleged that the City has a custom, policy, practice etc. to violate the constitutional rights of individuals in Setzler's position. This allegation is sufficient to assert municipal liability at the pleading stage. *Arpin, supra*, 261 F.3d at 925 ("Even if the complaint contains 'nothing more than a bare allegation that the individual [officer's] conduct conformed to official policy, custom, or practice,'" dismissal of a 1983 complaint alleging municipal liability is improper." (citation omitted by counsel))

### 3. Section 1983 Claim re Substantive Due Process

The Amended Complaint removes this claim.



1                   **4.       FEHA Claim for Failure to Accommodate, Failure to Participate In**  
 2                   **Interactive Process, and Retaliation**

3               In this claim, Setzler alleges that the City and its Sheriff's Office failed to accommodate  
 4 him, failed to engage in the interactive process, and retaliated against him after he attempted to  
 5 return to work subsequent to Judge Warren's decision, starting in June 2006. The pre-March 1,  
 6 2006 instances of these failures were adjudicated by Judge Warren but the post-decision failures  
 7 were not and, therefore, should not be precluded.

8                   **5.       Violation of Civil Service Rules**

9               In this claim, Setzler alleges, in pertinent part, that the City violated its own Civil Service  
 10 rules by placing him on sick leave, thereby precluding him from obtaining outside employment  
 11 while he waited for decisions pertaining to his application for IDR or for the Sheriff's Office to  
 12 accommodate his disability. Plaintiff has realleged this claim as Violation of Ordinance, namely  
 13 the Ordinance authorizing and adopting the Civil Service Rules, most recently codified at San  
 14 Francisco Municipal Ordinance No. 12-08, File No. 071136, approved Jan. 31, 2008.

15                   **6.       Wrongful Termination in Violation Of Public Policy**

16               In this claim, Setzler alleges that the City wrongfully terminated him in violation of a  
 17 whole host of statutory reasons. Defendant does not discuss this claim in its Memorandum of  
 18 Points and Authorities but its Notice of Motion seeks to have it dismissed on the grounds of  
 19 failure to state a claim and res judicata. Defendant fails to explain how this cause of action fails  
 20 to state a claim or how a judicial decision issued eight months prior to the termination can  
 21 preclude the issue of the reason(s) for Setzler's termination.

22                   **7.       Injunctive Relief**

23               Setzler seeks injunctive relief preventing Defendant City and its City Attorney's Office  
 24 from using concealment and fraud to defeat claims for industrial retirement benefits, injunctive  
 25 relief preventing the City from keeping a prospective IDR applicant in unpaid limbo through  
 26 rules preventing that applicant from returning to his or her last job, a new job within the City or  
 27 outside employment, and injunctive relief precluding the City's Retirement Board from  
 28 discriminating against applicants for IDR based on the length of time that they worked prior to

1 their injury. None of these requests for injunctive relief were discussed or addressed in the  
2 Petition for Writ of Mandate or any prior decision.

3 **III. CONCLUSION**

4 For the reasons set forth above, Plaintiff respectfully requests that this Court deny  
5 Defendant's Motion to Dismiss and Motion to Strike.

6 DATED: March 21, 2008

7 By: /S/ Stephen F. Henry  
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9 Attorney for Plaintiff  
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